

# **RENEWAL AND REVIVAL OF JUDGMENTS**

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## **COLLECTIONS AND CREDITORS' RIGHTS COURSE**

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### **CHAPTER 13**

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## TABLE OF CONTENTS

<b>I. SCOPE OF ARTICLE</b> .....	1
<b>II. THE LIFE OF A JUDGMENT</b> .....	1
<b>A. Texas Judgments</b> .....	1
1. <u>The Life of a Texas Judgment Is 10 Years and It May Be Renewed</u> .....	1
2. <u>If a Judgment Becomes Dormant, it May be Revived Within Two Years</u> .....	1
3. <u>Effect of Not Timely Reviving a Judgment</u> .....	1
<b>B. Federal Judgments</b> .....	1
1. <u>Federal Judgments Track State Judgments</u> .....	1
<b>C. Judgments of Other States - See Appendix A</b> .....	2
<b>D. Tolling of the Statute of Limitations</b> .....	2
1. <u>Are C.P.R.C. §34.001 and §31.006 Jurisdictional Statutes or Limitation Statutes?</u> .....	2
2. <u>Tolling Factors Which Do Apply</u> .....	2
a. Death of Claimant .....	2
b. Death of the Judgment Debtor .....	2
(1) When Estate is Administered .....	2
(2) When Estate is Not Administered .....	2
c. Fraudulent Concealment .....	2
d. Effect of Agreement .....	3
e. Effect of Order .....	3
3. <u>Tolling Factors Which May Apply</u> .....	3
a. Debtor's Absence From State .....	3
b. Legal Impediment .....	3
c. By Statute .....	4
d. Jurisdictional Dismissals .....	4
<b>E. Immortal Judgments</b> .....	4
1. <u>Immortal Texas Judgments</u> .....	4
a. Actions by the State of Texas. ....	4
b. Child Support. ....	4
2. <u>Immortal Federal Judgments</u> .....	4
a. Actions by the United States. ....	4
b. Student Loans .....	4
<b>III. RENEWING JUDGMENTS</b> .....	5
<b>A. The Life of a Judgment Is Determined by Its Writ History</b> .....	5
1. <u>Practical Application</u> .....	5
a. When is a Judgment Rendered? .....	5
b. how Is the 10-year Period Computed? .....	5
c. What Constitutes "Issuance" of a Writ of Execution?	
.....	5
(1) Issuance of a Writ of Execution Is More than Mere Clerical Preparation .....	5
(2) Issuance of a Writ of Execution Requires an Intent to Execute .....	6
(3) Issuance of Writ of Execution Is Sufficient Unless There Is a Want of Diligence and Lack of Good Faith .....	6
(4) The Court's Docket is Prima Facie Proof the of Issuance of a Writ of Execution .....	6
(5) Issuance of a Writ of Execution Requires Diligence .....	6
(6) Issuance of a Writ of Execution Need Not Have Any Expectation of a Recovery .....	7
(7) Enforcement of a Writ of Execution May Be Stayed by the Judgment-Creditor's Attorney .....	7

d.	What if the Writ of Execution is Voidable? . . . . .	7
e.	How Many Times Can the Judgment Be Renewed by Execution? . . . . .	7
2.	<u>Special Circumstances</u> . . . . .	7
a.	Death of the Judgment-Creditor . . . . .	7
(2)	Death of a Plaintiff - Estate Administered . . . . .	7
(3)	Death of a Plaintiff - Estate Not Administered . . . . .	7
3.	<u>Special Issues</u> . . . . .	8
a.	Multiple Plaintiffs . . . . .	8
b.	Multiple Defendants . . . . .	8
<b>B.</b>	<b>Renewal of Judgment by Subsequent Litigation</b> . . . . .	8
<b>C.</b>	<b>Renewal of Judgment by Registration or Domestication</b> . . . . .	8
1.	<u>States Must Recognize the Valid Judgment of a Sister State</u> . . . . .	8
2.	<u>Forum State May Investigate the Jurisdiction of the Rendering Sister State</u> . . . . .	8
3.	<u>Domestication of Foreign Judgment Results in New Judgment</u> . . . . .	9
a.	Can Judgments Be Daisy-Chained Together? . . . . .	9
b.	Is the New Judgment for Enforcement Purposes Only, or for All Purposes? . . . . .	9
<b>IV.</b>	<b>REVIVING JUDGMENTS</b> . . . . .	9
<b>A.</b>	<b>Generally</b> . . . . .	9
<b>B.</b>	<b>Revival of a Judgment by Scire Facias</b> . . . . .	9
1.	<u>What is a Proceeding by Writ of Scire Facias?</u> . . . . .	9
2.	<u>Scire Facias is a State Court Remedy Which is Not Available in Federal Courts</u> . . . . .	9
3.	<u>Practical Application</u> . . . . .	10
a.	The Court Rendering the Original Judgment Retains Jurisdiction Over the Parties . . . . .	10
b.	Venue Is Proper in the Court Which Rendered the Original Judgment . . . . .	10
c.	Necessary Parties . . . . .	10
d.	Pleading Requirements . . . . .	10
e.	The Judgment Debtor Must be Served . . . . .	10
f.	Judgment-Debtor's Response . . . . .	11
g.	The Hearing . . . . .	11
h.	Pre-judgment Relief is Available to the Applicant . . . . .	11
<b>C.</b>	<b>Revival of a Judgment by Action of Debt</b> . . . . .	11
1.	<u>Cases Which Have Been Held to Be an "Action on Debt"</u> . . . . .	11
2.	<u>Jurisdiction and Venue</u> . . . . .	11
a.	There Are No Special Jurisdiction or Venue Issues When Pursuing an Action of Debt . . . . .	11
b.	Whether a Texas Court Should Revive a Judgment Is a Function of the Laws of the State of Texas . . . . .	12
c.	A Sister State Can Recognize a Dormant or Dead Judgment . . . . .	12
3.	<u>Necessary Parties</u> . . . . .	12
4.	<u>Pleading Requirements</u> . . . . .	12
a.	Plaintiff's Pleadings . . . . .	12
(1)	Damages Must Be Pled . . . . .	12
(2)	Damages Need Not Be Pled with Particularity . . . . .	12
(3)	Costs May Be Recovered If Pled . . . . .	12
b.	Defendant's Pleading Requirements . . . . .	12
5.	<u>Plaintiff Must Exercise Diligence in Obtaining Service Upon the Defendant</u> . . . . .	13
6.	<u>Prosecuting the Suit to Judgment</u> . . . . .	13
7.	<u>Pre-Judgment Relief is Available to the Plaintiff</u> . . . . .	13
8.	<u>Special Circumstances - Death of the Judgment-Debtor</u> . . . . .	13
a.	Death of a Debtor - Estate Administered . . . . .	13
b.	Death of a Debtor - Estate Not Administered . . . . .	13

**V. CONCLUSIONS** . . . . . 13

    1. Scire Facias vs. Action of Debt . . . . . 13

    2. Execution May Issue . . . . . 14

**APPENDIX** . . . . . 15

**FORMS** . . . . . 16

    Form 1 - Application for Writ of Scire Facias to Revive Judgment . . . . . 17

    Form 2 - Affidavit in Support of Application for Writ of Scire Facias to Revive Judgment . . . . . 19

    Form 3 - Writ of Scire Facias . . . . . 21

    Form 4 - Order Reviving Judgment . . . . . 23



## RENEWAL AND REVIVAL OF JUDGMENTS

Michael J. Scott

### I. SCOPE OF ARTICLE

Judgments have three states of existence: live, dormant and dead. The transition from one state to the next is determined by the statute of limitations applicable to the judgment, as well as various procedural devices which can be employed to either renew a judgment prior to its becoming dormant, or to revive a judgment which has become dormant. The scope of this paper is (i) to review the statutory and case law which operate to determine the life of a judgment, (ii) to describe in greater detail when issuance of a writ of execution is sufficient to maintain the life of a judgment, and (iii) to explain the options which are available in reviving a judgment once it has become dormant.

### II. THE LIFE OF A JUDGMENT

That statutory scheme which is currently in place regarding the life of a judgment is substantially different than that which was in place during much of the State's history. For the period from 1841 to 1933, a writ of execution had to issue within 12 months of the rendition of a judgment, or the judgment would become dormant. Article 5532, V.A.C.S. If not revived within 10 years, the judgment was forever dead. Article 3773, V.A.C.S. Consequently, there is a substantial body of older case law which addresses the renewal and revival of judgments. The simpler and less onerous statutory scheme codified in 1995 by Tex. Civ. Prac. & Rem. Code §§ 34.001 and 31.006, combined with well established standards for the enforcement of judgments, has resulted in far fewer recent cases. The lack of current cases notwithstanding, judgments are judgments, and the Courts have long-valued the mechanisms by which they are maintained and enforced.

#### A. Texas Judgments

##### 1. The Life of a Texas Judgment Is 10 Years and It May Be Renewed

Tex. Civ. Prac. & Rem. Code §34.001.  
No Execution on Dormant Judgment.

- (a) If a writ of execution is not issued within 10 years after the rendition of a judgment of a court of record or a justice court, the judgment is dormant and execution may

not be issued on the judgment unless it is revived.

- (b) If a writ of execution is issued within 10 years after the rendition of a judgment but a second writ is not issued within 10 years after issuance of the first writ, the judgment becomes dormant. A second writ may be issued at any time within 10 years after issuance of the first writ.

##### 2. If a Judgment Becomes Dormant, it May be Revived Within Two Years

Tex. Civ. Prac. & Rem. Code §31.006.  
Revival of Judgment

A dormant judgment may be revived by scire facias or by an action of debt brought not later than the second anniversary of the date that the judgment becomes dormant.

##### 3. Effect of Not Timely Reviving a Judgment

If the period provided for in C.P.R.C. §31.006 has expired, the judgment is not only dead, it is forever barred. See Zummo v. Cotham, 137 Tex. 517, 519 (Tex. 1941); see also Arroyo Colorado Navigation District v. Young, 285 S.W.2d 308, 309 (Tex.App. — Austin 1955, writ ref'd n.r.e.); Williams v. Short, 730 S.W.2d 98 (Tex.App.-Houston [14th Dist.] 1987); Tex. Civ. Prac. & Rem. Code Ann. §31.006 (Vernon 1986).

#### B. Federal Judgments

##### 1. Federal Judgments Track State Judgments

28 U.S.C. §1962

“Every judgment rendered by a district court within a State shall be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and shall cease to be a lien in the same manner and time.”

Renewal and revival of a Federal Judgment involves an interplay between federal and state laws. For example, Fed. R. Civ. Proc. Rule 81(b) abolishes scire facias for federal judgments. Therefore, even though state law may allow such a procedure for purposes of reviving a state court judgment, it cannot be utilized in a federal court. This does not mean that a federal judgment cannot be revived. What it means is that the process by which

such a judgment is revived must conform to both federal and state legal process. See In re: Brints, 227 B.R. 94, 97 (N.D. Tex. 1998) (Federal courts obliged to follow state rules).

### C. Judgments of Other States - See Appendix A

Appendix A contains a list of sister states, as well as the limitation period applicable to each state's judgments.

### D. Tolling of the Statute of Limitations

#### 1. Are C.P.R.C. §34.001 and §31.006 Jurisdictional Statutes or Limitation Statutes?

Setting aside, for the moment, the fact that this section is entitled "Tolling of the Statute of Limitations," there is a real question as to whether C.P.R.C. §§ 34.001 and 31.006 can be treated in terms of a typical statute of limitation for all purposes. The great weight of authority points to these sections as limitation provisions, rather than jurisdictional. In Stanton v. Brown, 269 S.W.2d 853 (Tex. App.—Galveston 1954, no writ) the court directly addressed the issue of the nature of Article 5532 (which evolved into what is now Tex. Civ. Prac. & Rem. Code Ann. §34.006 (Vernon 1986)). The Stanton Court determined that the ten-year period in which a judgment may be revived is a limitation provision and must be pled as a defense. See also Sandford v. Sandford, 732 S.W.2d 449, 450-51 (Tex. App.—Dallas 1987, no writ) (opinion adopted by the Supreme Court) (Article 5532 is typical of statutes of limitation and does not restrict the jurisdiction of the court to hear untimely actions).

However, see Schluter v. Sell, 194 S.W.2d 125, 129 (Tex. App. 1946), which in construing the interaction of California statutes similar to those in Texas pertaining to the revival of a judgment, concluded that California's tolling provision regarding a party's absence from the state did not modify the period of time in which a judgment must be renewed or revived. See also Commerce Trust Co. v. Ramp, 135 Tex. 84, 138 S.W.2d 531 (Tex. 1940) overruled by statute (required strict adherence to the statutory scheme).

#### 2. Tolling Factors Which Do Apply

##### a. Death of Claimant

When a creditor dies, the limitation period applicable to claims of the creditor is suspended for 12 months. If an executor or administrator of the claimant's estate qualifies before the expiration of 12 months, the limitation period recommences at the time of the qualification. See C.P.R.C. §16.062; Markward v. Murrah, 138 Tex. 34, 156 S.W.2d 971, 973 (Tex. 1941); see also Guardia v.

Kontos, 961 S.W.2d 580, 585 (Tex. App.—San Antonio 1997, no pet. h.).

##### b. Death of the Judgment Debtor

###### (1) When Estate is Administered

Once a claim is properly established as a valid claim against the estate, the laws of limitations cease to apply while the estate is being administered under the probate law. In taking up this issue in Wygall v. Myers, 76 Tex. 598, 602, 13 S.W. 567 (Tex. 1890), the court observed that the "judgment needed no revival as against the estate; executions could not issue, and the laws requiring them to issue to keep the judgment alive and to prevent its being barred were, so far as the estate was concerned, suspended during administration."

###### (2) When Estate is Not Administered

The limitation period for a cause of action for the revival of a judgment is suspended for a period of 12 months upon the death of the judgment debtor. See Van Wormer v. Gallier, 19 S.W.2d 354, 355 (Tex. Civ. App. 1929). Whether or not an administration of the estate of the deceased is necessary is not a condition affecting the suspension of the statute of limitation. See Groesbeeck v. Crow, 91 Tex. 74, 40 S.W. 1028 (Tex. 1897).

##### c. Fraudulent Concealment

Fraud vitiates whatever it touches, Morris v. House, 32 Tex. 492 (1870). As such, fraud tolls the limitations of both C.P.R.C. §§ 34.001 and 31.006, if reasonable diligence was exercised in attempting to discover assets of the judgment debtors. See Estate of Stonecipher v. Estate of Butts, 591 S.W.2d 806, 809-810 (Tex. 1979). "Fraudulent concealment tolls limitations until the plaintiff discovers the fraud or could have discovered the fraud with reasonable diligence." Shah v. Moss, 67 S.W.3d 836, 45 Tex. Sup. Ct. J. 247 (Tex. 2001). As set forth in Estate of Stonecipher, to prevail in the tolling of the statute, the judgment creditor must establish (i) that the debtor fraudulently concealed his assets; and (ii) the creditor exercised reasonable diligence in seeking to locate such assets. In Harding v. Lewis, 133 S.W.3d 693, 697 (Tex.App.—Corpus Christi 2003), the judgment debtor transferred property to his brother; which the brother then transferred back to the debtor after the judgment had become dormant and could no longer be revived. The court found that the judgment creditor's search of property records, attempts to conduct post-judgment written discovery and employment of a property search firm were sufficient to establish reasonable diligence and it revived the judgment.

Concealment, however, is more than mere silence. “There must be some trick or contrivance intended to exclude suspicion and prevent injury. There must be reasonable diligence; and the means of knowledge are the same thing as knowledge itself.” Estate of Stonecipher, 591 S.W.2d at 809. Finally, “reasonable diligence” is a question of fact. See Ruebeck et al. v. Hunt ex ux., 142 Tex. 167, 176 S.W.2d 738 (Tex. 1943).

#### d. Effect of Agreement

In Beadles v. Smyser, 209 U.S. 393 (U.S. 1908), a judgment-creditor along with other creditors held judgments against the City of Perry, Oklahoma. The City and the creditors entered into an agreement whereby the creditors agreed to payment of the judgments by the City. Under the agreement, the City's treasurer was authorized to pay the judgments (i) in the order of their rendition, (ii) out of funds as they accrued in the City's judgment fund. The statute of limitation for enforcement of a judgment in Oklahoma was 5 years. The City treasurer made payments for five years in accordance with the agreement. Beginning in the sixth year, the City refused to pay the judgment-creditor on the ground that the judgment had become dormant and was barred by the statute of limitations due to the creditor's failure to issue execution on the judgment or to revive same. The judgment-creditor claimed that the City was estopped from contending the creditor's judgment was dormant because the creditor would have violated the terms of the agreement had he sought execution upon the judgment. The Court agreed, stating:

“As we have said, the principles of natural justice and fair dealing are alike applicable to municipal corporations as to individuals, and to permit the city to escape the payment of judgments, whose validity is not otherwise questioned, for failure to issue execution or sue out a writ of mandamus during the time when the action of the city officers was such as to prevent the exercise of the right, would be to permit the action of the representatives of the city, who have had the benefit of the contract during the time both parties were observing its obligations, to work a gross injustice upon the creditors holding valid judgments against the municipality.”

Id. at 404. Based upon the reasoning of the Court, it would not appear that the holding is limited to governmental entities.

#### e. Effect of Order

In In re Marriage of Ward, 806 S.W.2d 276, 277 (Tex. App. 1991), the Court addressed the issue of whether a judgment ordering child-support payments could be enforced more than ten years after the failure of the debtor to make the prescribed payments. Relying on Shannon v. Fowler, 693 S.W.2d 54 (Tex. App. -- Ft. Worth 1985, writ dismissed) the Court decided that C.P.R.C. §34.001 limitations ran only as to those payments which were due and payable for more than ten years and that the judgment, itself, had not become dormant; thus, despite the fact that it was rendered more than ten years earlier.

### 3. Tolling Factors Which May Apply

#### a. Debtor's Absence From State

In general, the absence of the defendant from the state suspends the running of the limitation period during the defendant's absence. See C.P.R.C. §16.063; Loomis v. Skillerns-Loomis Plaza, Inc., 593 S.W.2d 409, 410 (Tex. App.--Dallas 1980, ref. n.r.e.). Although this is not true in the case of a nonresident defendant who was absent from the state when the cause of action accrued, accrual for the purpose of computing the statute of limitations for a judgment occurs upon rendition of such judgment. If the defendant is present in Texas when the cause of action occurs, even if he is a nonresident, the suspension rule applies and the limitation period is suspended during the defendant's absence. See Wise v. Anderson, 163 Tex. 608, 359 S.W.2d 876, 879 (Tex. 1962); Dicker v. Binkley, 555 S.W.2d 495, 496 (Civ. App.--Dallas 1977, ref. n.r.e.).

Whether the defendant may be served by substituted service in the foreign state has no effect on the tolling provisions of C.P.R.C. §16.063. If the defendant is not actually present in the state, the limitation period is suspended. See Vaughn v. Deitz, 430 S.W.2d 487, 490 (Tex. 1968); Dicker v. Binkley, 555 S.W.2d 495, 496-497 (Civ. App.--Dallas 1977, ref. n.r.e.). As described in Vaughn, “the absence from this state of a person against whom a cause of action may be maintained suspends the running of the applicable statutes of limitations for the period of the person's absence.” Vaughn, 430 S.W.2d at 490. This tolling applies even when a plaintiff knows the defendant's whereabouts and is capable of serving him. See Oles Grain Co. v. Safeco Ins. Co. of Am., 221 B.R. 371, 378 (N.D. Tex. 1998).

#### b. Legal Impediment

The statute of limitation is tolled when a legal impediment, such as a bankruptcy stay, prevents a plaintiff from filing suit. See Peterson v. Texas

Commerce Bank--Austin, 844 S.W.2d 291, 294 (Tex. App.--Austin 1992, no writ).

c. By Statute for the FDIC

The time frame necessary for the FDIC, or a party claiming through the FDIC, to renew or revive a judgment may be modified by 12 U.S.C. §1821(d)(14) which preempts state law. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) provides to the FDIC a new 6-year limitation period for contract claims and a new 3-year limitation period for tort claims. While FIRREA's express terms only grant this six-year limitations period to the FDIC, the Texas Supreme Court has held that the FDIC's successors in interest are entitled to the benefit of the longer period when the claim had already occurred before the FDIC received the claim. See Holy Cross Church of God in Christ v. Wolf, 44 S.W.3d 562, 567 (Tex. 2001); Jackson v. Thweatt, 883 S.W.2d 171, 174 (Tex. 1994).

d. Jurisdictional Dismissals

Pursuant to C.P.R.C. §16.064(a), when an action is dismissed for lack of jurisdiction, set aside or annulled in a direct proceeding, a party may refile the suit in a court with proper jurisdiction within 60 days, if the first filing was not made with intentional disregard of proper jurisdiction. See Clary Corp. v. Smith, 949 S.W.2d 452, 461 (Tex. App.--Fort Worth 1997, writ denied). This may be applicable in scire facias proceedings which were mistakenly brought in a court other than that rendering the original judgment.

## E. Immortal Judgments

Certain types of judgments never expire, either because of who the holder of the judgment is, or because of the nature of the claim reflected by the judgment.

### 1. Immortal Texas Judgments

#### a. Actions by the State of Texas.

“A right of action of this state or a political subdivision of the state . . . is not barred by any of the following sections: . . . 31.006.” Tex. Civ. Prac. & Rem. Code §16.061(a).

#### b. Child Support.

The Office of the Attorney General acts on behalf of the State in reviving judgments for child support and in seeking any arrearage related thereto. As such, a prior judgment can be revived at any time by any action brought by the Attorney General. See In the Interest of E.D., 102 S.W.3d 859 (Tex.App.–Corpus Christi 2003).

Note: the Texas Supreme Court has specifically reserved the issue of whether C.P.R.C. §§31.006 and 34.001 limit enforcement of child-support obligations at all. See In the Interest of A.D., 73 S.W.3d 244, 249 (Tex. 2002); see also Sprouse v. Sprouse, 92 S.W.3d 502 (Tex. 2002).

### 2. Immortal Federal Judgments

#### a. Actions by the United States.

See United States v. Summerlin, 310 U.S. 414, 60 S. Ct. 1019, 1020, 84 L. Ed. 1283 (U.S. 1940); Farmers Home Admin. v. Muirhead, 42 F.3d 964 (5th Cir. Miss. 1995); United States v. Peoples Household Furnishings, Inc., 75 F.3d 252 (6th Cir. Mich. 1996).

#### b. Student Loans.

In Lovitt v. Tex. GSL Corp., 2005 U.S. Dist. LEXIS 12677 (N.D. Tex. 2005), the debtor defaulted on a student loan obligation from the Texas Guaranteed Student Loan Corporation and the corporation obtained a judgment against the debtor in state court. The corporation never had a writ of execution issued and the corporation never attempted to revive the judgment. However, the corporation did attempt to collect the debt through an administrative garnishment, which the debtor challenged based upon the dormancy of the underlying judgment. The court held for the corporation, finding that 20 U.S.C.S. §1091a retroactively eliminated all limitations and laches defenses that could be imposed against student loan debts. As stated therein:

#### 20 U.S.C. §1091a(a)(2)(B) - Student Loans.

Notwithstanding any other provision of statute, regulation, or administrative limitation, no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken by . . . a guaranty agency that has an agreement with the Secretary [of Education] under section 1078(c) of this title that is seeking the repayment of the amount due from a borrower on a loan made under part B of this subchapter [IV] after such guaranty agency reimburses the previous holder of the loan for its loss on account of the default of the borrower.

20 U.S.C.S. §1091a preempts state law. See also Barron v. Tex. Guaranteed Student Loan Corp. (In re Barron), 264 B.R. 833, 846 (Bankr. E.D. Tex. 2001).

### III. RENEWING JUDGMENTS

#### A. The Life of a Judgment Is Determined by Its Writ History

In describing writs of execution the Texas Supreme Court in Commerce Trust Co. v. Ramp, 135 Tex. 84, 138 S.W.2d 531, 536 (Tex. 1940) (overruled on other grounds Tanner Dev. Co. v. Ferguson, 561 S.W.2d 777, 21 Tex. Sup. J. 25 (1977)) stated that a judgment creditor has a “simple and inexpensive remedy . . . and may prolong the life of a judgment indefinitely by merely having executions timely issued . . .” Issuance of a writ of execution complies with the statutory scheme for prolonging the life of a judgment. See Zummo v. Cotham, 137 Tex. 517 (Tex. 1941); see also C.P.R.C. §34.001. Further, execution is the exclusive mechanism for prolonging the life of a judgment. Statutes which establish the life of a judgment are strictly construed. As stated in Commerce Trust Co. v. Ramp, 138 S.W.2d at 536, citing to Russell v. McCampbell, 29 Tex. 31 (1867), “a remedy being purely a statutory one, we think it must be measured by the statute itself . . . The courts have no authority to make an exception to this statutory rule.”

##### 1. Practical Application

An initial writ of execution may be issued at any time within 10 years from the rendition of a judgment. However, if no execution is sought within the first 10-year period, the judgment will become dormant pursuant to C.P.R.C. § 34.001. See John F. Grant Lumber Company v. Bell, 302 S.W.2d 714, 717 (Civ. App.--Eastland 1957, writ ref.); Cox v. Nelson, 223 S.W.2d 84, 86 (Civ. App.--Texarkana 1949, writ denied)

In the event that a writ of execution is issued within the initial 10-year period, a subsequent writ may be issued within 10-years after a previous writ and its issuance will serve to extend the life of the judgment for an additional 10 years. See C.P.R.C. § 34.001(b); see also Hicks v. First Nat. Bank in Dalhart, 778 S.W.2d 98, 103-104 (Tex. App.--Amarillo 1989, writ den.). As a result, a judgment creditor may extend the life of a judgment indefinitely by attempting an execution at least once every 10 years. See Commerce Trust Co., 138 S.W.2d at 536.

##### a. When is a Judgment Rendered?

A rendition of a judgment is “the pronouncement by the trial court of its conclusions and decision upon the matters submitted to it for adjudication.” Such conclusions and decisions may be oral or written. In Arriaga v. Cavazos, 880 S.W.2d 830, 833 (Tex.App. -- San Antonio 1994, no writ), the Court said that “judgment is rendered when the decision is officially announced

either orally in open court or by a memorandum filed with the clerk” (citing Comet Aluminum Co. v. Dibrell, 450 S.W.2d 56, 58 (Tex. 1970); see also McDaniel v. Signal Capital Corp., 198 B.R. 483, 486 (S.D. Tex. 1996) As such, rendition is distinguishable from the entry of judgment which is a purely ministerial act by which judgment is made of record in the court. Arriaga 880 S.W.2d at 833.

By contrast, “signing” occurs when the judge actually signs the written draft of the judgment, and this is deemed to be the date of rendition for purposes of calculating appellate time limits by Tex. R. Civ. P. Rule 306a(1). See also Burrell v. Cornelius, 570 S.W.2d 382, 383 (Tex. 1978). However, be aware that Rule 306a(1) specifically provides that “this rule shall not determine what constitutes rendition of a judgment or order for any other purpose” (emphasis added) and, thus, should not be relied upon in equating “signing” with “rendition” when dealing with a judgment near the end of its life or dormancy.

##### b. how Is the 10-year Period Computed?

Computation of limitations periods for both C.P.R.C. § 34.001(a) and (b), as well as § 31.006 is governed by Texas Government Code § 311.014. See McDaniel v. Signal Capital Corp., 198 B.R. 483, 487 (N.D. Tex. 1996). Section 311.014 provides:

- (a) In computing a period of days, the first day is excluded and the last day is included.
- (b) If the last day of any period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday.
- (c) If a number of months are to be computed by counting the months from a particular day, the period ends on the same numerical day in the concluding month as the day of the month from which the computation is begun, unless there are not that many days in the concluding month, in which case the period ends on the last day of that month.

##### c. What Constitutes “Issuance” of a Writ of Execution?

###### (1) Issuance of a Writ of Execution Is More than Mere Clerical Preparation

“The term ‘issue’ means more than the mere clerical preparation and attestation of the writ, and requires that it should be delivered to an officer for enforcement.” Bourn vs. Robinson, 49 Tex. 157, 107 S.W. 873, 875 (Tex. Civ. App. 1908).

“The law requires that when an execution has been placed in the hands of a sheriff, he shall note upon it the hour and the day received, and shall, within the time prescribed by the execution, make due return of what he has done, in compliance with the requirements of the writ. . . . In order to be a compliance with the statute the writ must be placed in the hands of the officer whose duty it is to execute it; and until this is done there has been no sufficient compliance with the law ” Id.

As stated by the Court in Harrison v. Orr, 296 S.W. 871, 876 (Tex. Comm’n App. 1927), “[t]his appears to us to be a just rule since . . . execution of process is the life of the law, and forms of law are not generally to be used in mockery of its spirit.”

(2) Issuance of a Writ of Execution Requires an Intent to Execute

In Harrison v. Orr, 296 S.W. at 876, a clerical preparation of the writ was made and an endorsement was put upon the writ instructing the sheriff to “hold until August 25, then return it.” The instructions were obeyed, with the sheriff making only a formal return of service, but no actual attempt to execute. The Harrison court stated that “[i]f it turns out that such was the nature of this transaction, it must be held, in our opinion, that it did not amount to an ‘issuance’ of an execution . . .” as provided for in the statute named.

(3) Issuance of Writ of Execution Is Sufficient Unless There Is a Want of Diligence and Lack of Good Faith

In Pfeuffer v. Werner, 27 Tex.Civ.App. 288, 65 S.W. 888, 889 (Tex. App. 1901, writ denied), it was insisted that when execution is sued out without intention to enforce it by levy and sale, or by ordering it returned without levy, the execution is not “issued” within the meaning of the statute. In passing on the question, the court said “it does not appear that appellants sued out the executions without any purpose of enforcing them.” Id. Although in Pfeuffer, there was evidence affirmatively showing diligence and good faith, the opinion contemplates that the attack must be on the basis of want of diligence and lack of good faith. See Benson v. Greenville Nat’l Exchange Bank, 253 S.W.2d 918, 926 (Tex. App. 1952); see also Riddle v. Bush, 27 Tex. 675 (Tex. 1864).

(4) The Court’s Docket is Prima Facie Proof of the Issuance of a Writ of Execution

The docket entry itself is an official record and is evidence of the issuance of a writ of execution. See Goggans v. Green, 165 S.W.2d 928 (Tex.Civ.App. 1942); see also Bendy v. W. T. Carter & Bros., 269 S.W. 1037 (Tex. Comm’n App. 1925); Schleicher v. Markward, 61 Tex. 99 (Tex. 1884). Furthermore, the absence of a return does not negate an issuance. See Tyler v. Henderson, 162 S.W.2d 170 (Tex.Civ.App. 1942, writ ref’d w.o.m.); see also Bunn v. Mackin, 25 S.W.2d 942 (Tex. Civ. App. 1930, writ ref’d). The statute does not require a return as an element of issuance. Once a writ is delivered into the hands of the sheriff, a presumption arises that the officer performed his duty. See Schneider v. Dorsey, 96 Tex. 544, 74 S.W. 526 (Tex. 1903). “When there is no showing that the officer was in any way thwarted or deterred from performing his duty, we think issuance is completed upon delivery to the proper officer and that a delivery was here proved.” Carpenter v. Probst, 247 S.W.2d 460, 461 (Tex. App. 1952, writ ref’d).

(5) Issuance of a Writ of Execution Requires Diligence

In Williams v. Short, 730 S.W.2d 98, 100 (Tex. App.–Houston [14th Dist.] 1987, ref. n.r.e.), a writ of execution was timely issued, but delivery to the sheriff occurred nearly three months after the judgment had become dormant. The Williams court held that a lack of diligence in delivery of the writ was ineffective to prevent the dormancy of judgment.

The analysis is similar to that for the bringing of a claim. In Ross v. American Radiator & Standard Sanitary Corp., 507 S.W.2d 806, 809 (Tex.App.–Dallas 1974, writ ref’d n.r.e.), the Court found that a determination of diligence in a post-judgment context was analogous to the bringing of a claim for purposes of measuring the statute of limitations. As with the initiation of any legal proceeding, “[t]he mere presentation of a petition to the clerk for filing is not sufficient to interrupt or toll the statute of limitations; there must follow a diligent effort to secure issuance and service of citation. Id., citing to Rigo Manufacturing Co. v. Thomas, 458 S.W.2d 180, 182 (Tex. 1970); see also Owen v. Eastland, 124 Tex. 419, 78 S.W.2d 178 (Tex. 1935) and Russell v. Taylor, 121 Tex. 450, 49 S.W.2d 733 (Tex. 1932).

## (6) Issuance of a Writ of Execution Need Not Have Any Expectation of a Recovery

In R. B. Spencer & Co. v. Harris, 171 S.W.2d 393, 395 (Tex.App.–Amarillo 1943, writ ref'd), a writ was issued and delivered to the sheriff even though the judgment-creditor could not identify any non-exempt assets upon which the writ could be executed. The officer returned the writ “nulla bona” the same day it was received, having checked the county’s property tax roles for assets of the debtors. In the view of the Court, the writ was delivered to the officer “for the only service that was possible” and, under these circumstances, the Court found neither a want of diligence nor lack of good faith. Id. “It was at least placed where it might have been executed, and some efficient act done under it.” Id.

## (7) Enforcement of a Writ of Execution May Be Stayed by the Judgment-Creditor’s Attorney

In Benson v. Greenville Nat’l Exchange Bank, 253 S.W.2d 918,926 (Tex. Civ. App.–Texarkana 1952, writ ref’d n.r.e.), the sheriff executed a writ by levying upon the one-fourth undivided interest of the judgment-debtor in shares of stock of a closely-held corporation. The shares were advertised for sale; however, prior to the sale the judgment-creditor instructed the sheriff not to further execute upon the writ and to return the writ to the district clerk. This was done. The Court held the attempted execution to be sufficient to renew the statute of limitations on the judgment, stating “[w]e are also of the opinion that the lien of the judgment was not lost by the return of the execution after the levy, by the direction of the attorney of the plaintiffs in execution.” Id., citing to Riddle v. Bush, 27 Tex. 675 (1864) and Graves v. Hall, 13 Tex. 379 (1855).

## d. What if the Writ of Execution is Voidable?

Failure to comply with statutory requirements regarding the issuance of a writ of execution “will not incur the penalty of barring a judgment if the facts show justification for failure to comply with the provisions of [such statute] and the issuance of execution” Grissom v. F. W. Heitmann Co., 130 S.W.2d 1054 (Tex. Civ. App. 1939); see also Cabell v. Orient Ins. Co. et al., 22 Tex.Civ. App. 536, 55 S.W. 610, 611 (1900) (an execution which is improperly issued is not void, but is irregular; it may be avoided, but it is sufficient to prevent the judgment from becoming dormant).

Also, it should be noted that Tex. R. Civ. Proc. Rule 629 does not require the fact that the judgment has been revived to be recited in a subsequent writ of execution and the failure to do so does not render the writ voidable. “The phrase ‘describe the judgment’ means the one and

only final judgment and does not include an order reviving a judgment.” Berly v. Sias, 152 Tex. 176, 179-180 (1953). “The order reviving the judgment [by scire facias] cannot change, expand, or contract the original judgment in any way. It operates as a lifting of the bar to its enforcement. It does not become a part of the original judgment although it is a portion of the proceeding supporting that judgment.” Id.

## e. How Many Times Can the Judgment Be Renewed by Execution?

Indefinitely. See Commerce Trust Co. v. Ramp, 135 Tex. 84, 93 (Tex. 1940) (refers to prior statutory scheme); see also Zummo v. Cotham, 137 Tex. 517, 155 S.W.2d 600 (Tex. 1941).

## 2. Special Circumstances

## a. Death of the Judgment-Creditor

## (1) Death of a Plaintiff after Writ of Execution Has Issued.

“Death of a plaintiff after a writ of execution has been issued does not abate the execution, and the writ shall be levied and returned as if the plaintiff were living.” C.P.R.C. §34.002(c)

## (2) Death of a Plaintiff - Estate Administered

“If a plaintiff dies after judgment, any writ of execution must be issued in the name of the plaintiff’s legal representative, if any, and in the name of any other plaintiff.” C.P.R.C. §34.002(a)

Note: An affidavit of death and a certificate of appointment of the legal representative, given under the hand and seal of the clerk of the appointing court, must be filed with the clerk of the court issuing the writ of execution. C.P.R.C. §34.002(a)

## (3) Death of a Plaintiff - Estate Not Administered

“If a plaintiff dies after judgment and his estate is not administered, the writ of execution must be issued in the name of all plaintiffs shown in the judgment.” C.P.R.C. §34.002(b).

Note: An affidavit showing that administration of the estate is unnecessary must be filed with the clerk of the court that rendered judgment and any money collected under the execution is paid into the registry of the court,

which the court then partitions and pays to the parties entitled to it. C.P.R.C. §34.002(b).

### 3. Special Issues

Multiple parties, be they plaintiffs or defendants, raise certain questions regarding the effectiveness of a writ of execution in prolonging the life of a judgment. This author is not aware of any Texas case law which confront these issues directly, however, certain principles may be gleaned from the statutory structure and jurisprudence regarding the issuance of a writ of execution.

#### a. Multiple Plaintiffs

Is the issuance of a writ of execution by a single plaintiff sufficient to renew a judgment as to all judgment creditors? As set forth in the rules, a “plaintiff, his agent or attorney” is the party which must request that a writ of execution be issued. See T.R.C.P. 621. However, C.P.R.C. § 34.001 provides only that “a writ of execution” issue (emphasis added). Although it could certainly be argued that the literal text of C.P.R.C. § 34.001 has been satisfied by a single issuance of a writ at the request of a single plaintiff, this approach seems contrary to the policies underscoring the renewal of a judgment. Clearly, a single plaintiff does not represent the interest of the plaintiff group, for if this were the case, there would be no need for C.P.R.C. § 34.002 addressing the issuance of writs in the event one of the judgment holders is deceased. The argument is then one of literal compliance with section C.P.R.C. § 34.001 versus implementation of a statutory scheme concerning the enforceability of judgments. This issue has yet to be decided.

#### b. Multiple Defendants

Is the issuance of a writ of execution as to a single defendant sufficient to renew a judgment as to all judgment debtors? This question is somewhat easier. Although C.P.R.C. § 34.001 is written in terms of “a judgment,” the practical affect of any judgment against multiple defendants is that the judgment may be treated as multiple judgments directed as to each judgment debtor. In such a case, the issue of whether the judgment is renewed is controlled by the judgment creditor’s actions with respect to each judgment debtor. Further, as will be discussed, *infra*, the ability to prolong or revive a judgment without the involvement of the judgment-debtor invokes due process concerns.

### B. Renewal of Judgment by Subsequent Litigation

The general rule is that only one final judgment will be allowed in any cause of action. See Parks v. Young, 12 S.W. 986, 987, 75 Tex. 278, 279 (Tex. 1889); Stevens v. Stone, 94 Tex. 415, 60 S.W. 959 (Tex. 1901). However, the court in Stevens carved out a narrow exception. As stated by the Stevens court, “our court should never allow a suit upon a judgment unless it should be made to appear that the second judgment would be more efficacious than the first.” Id. The court then held that having a judgment barred by the laws of another state, where the defendant had property subject to execution, falls within the exception. Therefore, where a second judgment places the judgment creditor in a more advantageous position than he would be in without the second judgment, such second judgment is allowed. Id.; see also Hall v. Oklahoma Factors, 935 S.W.2d 504, 507 (Tex. App.–Waco 1996); Elliott v. San Benito Bank & Trust Co., 137 S.W.2d 1070, 1071 (Tex. Civ. App. 1940) (clarification of property subject to execution as against the judgment creditor’s heirs was sufficient advantage to warrant a second judgment).

### C. Renewal of Judgment by Registration or Domestication

#### 1. States Must Recognize the Valid Judgment of a Sister State

In Union Nat’l Bank v. Lamb, 337 U.S. 38 (U.S. 1949) the court was confronted with a petitioner who obtained a Colorado judgment, revived it in that state and then served it upon the judgment-debtor in Missouri. The Missouri State Supreme Court refused to enforce the judgment, holding that the United States Constitution's Full Faith and Credit Clause did not require Missouri to recognize Colorado's more lenient policy on the issue of revival of judgments. The Supreme Court of the United States disagreed, holding that once the court of a sister state had jurisdiction over the parties and of the subject matter, its judgment was valid and could not be impeached in the forum state, even though it could not have been obtained there. See also McElreath v. McElreath, 162 Tex. 190, 345 S.W.2d 722, 744 (Tex. 1961); Chunn v. Gray, 51 Tex. 112, 114 (Tex. 1879).

#### 2. Forum State May Investigate the Jurisdiction of the Rendering Sister State

A Texas court may examine the facts to determine whether one sister state's court had jurisdiction to enter the decree for which full faith and credit is sought. McElreath, 345 S.W.2d 744; see also Roath v. Uniroyal, Inc., 582 S.W.2d 185, 186 (Tex. Civ. App. – Beaumont

1979). Under such circumstances, the laws and jurisprudence of the rendering sister state are applied.

### 3. Domestication of Foreign Judgment Results in New Judgment

#### a. Can Judgments Be Daisy-Chained Together?

There exists a fundamental question as to whether the domestication of a foreign judgment results in a new judgment for all purposes. Put simply, can a judgment (J1) from a state with a non-renewable judgment be domesticated to a sister state as a new judgment (J2), and that new judgment (J2) be domesticated back to the original state; thereby resulting in a third judgment (J3). If, in fact, the second judgment (J2) is an entirely new judgment of the sister state, this question has already been answered by the United States Supreme Court in Roche v. McDonald, 275 U.S. 449, 452 (U.S. 1928), discussed *infra*. The answer is yes it can. Therefore, the issue turns on the question of what, exactly, results from the domestication of a foreign judgment: A judgment for purposes of enforcement only, or an entirely new judgment?

#### b. Is the New Judgment for Enforcement Purposes Only, or for All Purposes?

In Home Port Rentals v. Int'l Yachting Group, Inc., 252 F.3d 399, 404-406 (5th Cir. 2001), the court confronted the issue of which state's laws governed the enforceability of a judgment rendered by the United States District Court for the Western District of Louisiana and registered under 28 U.S.C.S. § 1963 in the United States District Court for the District of South Carolina. The Court held that section 1963 is more than a "ministerial act" and more than a mere procedural device for the enforcement of judgments; it is the equivalent of a new judgment for enforcement purposes. Home Port Rentals, 252 F.3d at 405. However, the Court stopped short of declaring the resulting judgment to be an entirely new judgment and, in fact, went to great lengths to so limit its decision:

"We emphasize in closing that the issues we consider and rule on today implicate only the enforcement of a registered judgment from another federal district court in the registration court, and then only enforcement within the district where the registration court is situated. We need not and therefore do not address or express an opinion on any effects of registration other than on enforcement within the geographical confines of the registration court's district -- not the effect on the creation

of judicial mortgages or liens against property of the judgment debtor, not the effect on portability; and not the effect on revival, re-inscription or renewal: just the effect on the time and timing of local enforcement."

Id. at 410.

## IV. REVIVING JUDGMENTS

### A. Generally

If a judgment becomes dormant, it may be revived by "scire facias or an action of debt" which must be brought within two years of the anniversary of the date upon which the judgment became dormant. C.P.R.C. §31.006. A scire facias [pronounced sáy-riy féy-shæs (formal pronunciation symbols) or s -r f shous (Texas *ad hoc* pronunciation symbols)] asks the court which rendered the original judgment to revive such judgment on its records, whereas an action of debt seeks to obtain a new judgment which is predicated upon there having been a prior adjudication which should still be enforced.

### B. Revival of a Judgment by Scire Facias

#### 1. What is a Proceeding by Writ of Scire Facias?

"Scire facias" is the Latin term for a judicial writ founded upon some matter of record, such as a judgment, and requiring the person against whom it is brought to show cause why the party bringing it should not have advantage of such records. Black's Law Dictionary (5th ed. 1979); see also In re Brints, 1998 Bankr. LEXIS 1574 (Bankr. N.D. Tex. 1998).

A proceeding by writ of scire facias is not a new action, but a continuation of the underlying case. As such, an order entered upon an application for a writ of scire facias does no more than revive the original judgment; no new judgment can be rendered and "nothing can be adjudged except that execution issue on the original judgment." (emphasis added). Collin County Nat'l Bank v. Hughes, 110 Tex. 362, 220 S.W. 767 (1920), citing Camp v. Gainer, 8 Tex. 372 (1852); see also Bridges v. Samuelson, 73 Tex. 522, 11 S.W. 539 (Tex. 1889). Notwithstanding the foregoing, a revival of a judgment by scire facias also revives all enforcement mechanisms and interests, to the extent such have not been cut off by intervening events. See Booth v. Pickett, 53 Tex. 436 (1880).

#### 2. Scire Facias is a State Court Remedy Which is Not Available in Federal Courts

FRCP 81(b) abolishes scire facias for federal judgments. However, FRCP 69(a) provides:

“The procedure on execution, in proceedings supplementary to and in aid of judgment, and in proceedings on and in aid of execution shall be in accordance with the practice of and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.”

Therefore, federal courts look to state law in their analysis of an action to revive judgment. A motion to revive or an action of debt is the only acceptable method of extending the life of a federal judgment. See FDIC v. Shaid, 142 F.3d 260, 261-62 (5th Cir. 1998); see also In re: Brints, 227 B.R. 94, 97 (N.D. Tex. 1998).

### 3. Practical Application

#### a. The Court Rendering the Original Judgment Retains Jurisdiction Over the Parties

As stated in Berly v. Sias, 152 Tex. 176, 255 S.W.2d 505 (Tex. 1953), “a motion for scire facias is not an independent suit but is a continuation of the original suit. As a continuation of the original suit it is supported by the jurisdiction of the person obtained in the original case.”

#### b. Venue Is Proper in the Court Which Rendered the Original Judgment

An application to revive a dormant judgment by scire facias should be brought in the same court where the original judgment was rendered. Koenig v. Marti, 103 S.W.2d 1023, 1025 (Tex. Civ. App. 1937, writ dismissed w.o.j.).

#### c. Necessary Parties

All parties having a legal and enforceable interest in the subject matter of the original judgment are necessary parties in any action to revive such judgment. See Mills v. Traylor, 30 Tex. 7 (1867). Conversely, if a party’s interest in the subject matter of the original judgment arose after the rendition of the original judgment, then they are not necessary parties in a scire facias proceeding. See Robertson v. Coates, 65 Tex. 37 (1885).

A judgment may be revived as against a legal entity, even if such entity is no longer authorized to do business in the State of Texas. See Simmons v. Zimmerman Land & Irrigation Co., 292 S.W. 973 (Tex. Civ. App. 1927) (either action of debt or scire facias may be brought against company which forfeited its right to do business for nonpayment of franchise tax).

#### d. Pleading Requirements

A scire facias proceeding is initiated by the filing of an Application for Writ of Scire Facias which seeks the issuance of the Writ of Scire Facias and the setting of a hearing related thereto. The writ itself is in the form of a notice of hearing to show cause as to why the relief requested should not be granted. The Application for Writ of Scire Facias is essentially a pleading and should contain all the allegations and recitals of previous proceedings necessary to show the plaintiff’s right, and that he is entitled to all the judgment or relief prayed for in the action. See Fitzgerald v. Evans & Huffman, 53 Tex. 461 (1880). In an action on a judgment by Application for Writ of Scire Facias, it is not necessary for the plaintiff to bring before the court the proceedings in the original suit, Bullock v. Ballew, 9 Tex. 498, 500 (1853); see also Schleicher v. Markward, 61 Tex. 99, 101 (1884).

Plaintiff need only establish that the requested revival is allowed by C.P.R.C. § 31.006. Unless an applicant is relying upon the tolling of these limitations, this should be simply a matter of record, as both the judgment and the issuance of writs of execution are part of the court’s record. Technically, the court may take judicial notice of the original judgment and the issuance of writs of execution; however, a better practice is to attach copies of these documents to the application and to support the application by affidavit.

Finally, Plaintiff should pray that the judgment be revived in all respects and that execution issue thereon. Although this may seem fundamental to a scire facias proceeding, it remains a proceeding in which relief is being requested. The applicant is only entitled to that for which they ask.

#### e. The Judgment Debtor Must be Served

Plaintiff must serve the defendant with citation and a copy of the motion to revive judgment by scire facias, and demonstrate such service through a return of service filed with the court. See FDIC v. Bauman, 2004 U.S. Dist. LEXIS 14783, 5-6 (N.D. Tex. 2004); see also TRCP Rule 154 (Requisites of Scire Facias. “The scire facias and returns thereon, provided for in this section, shall conform to the requisites of citations and the returns thereon, under the provisions of these rules.”). However, see Schluter v. Sell, 194 S.W.2d 125, 130 (Tex. Civ. App. 1946), in which the court holds that “reasonable notice is all that is required to support the judgment of revival or to enforce execution of the judgment.”

Service may be by way of a nonresident notice and writ of scire facias served by the Secretary of State. See Berly v. Sias, 152 Tex. 176 (1953).

## f. Judgment-Debtor's Response

There can be no collateral attack on the original judgment. In an action on a judgment, no defense can be admitted which existed prior to the judgment. "It is a maxim in the law that there can be no averment in pleading against the validity of a record, though there may be against its operation; therefore no matter of defense can be pleaded which existed anterior to the recovery of the judgment." Bullock v. Ballew, 9 Tex. at 500; see also Hopkins v. Howard, 12 Tex. 7, 9 (1854). This rule relates to such matters as would render the judgment defective, erroneous, or voidable. See Taylor v. Harris, 21 Tex. 438, 439 (1858). Even though the judgment may be erroneous, "debt lies until it has been reversed." Bullock, 9 Tex. at 500.

The judgment-debtor can attack the judgment as being void if the debtor can plead and show its nullity, and for that purpose the judgment-debtor may bring before the court the prior proceedings which resulted in the rendition of the original judgment. See Bullock, 9 Tex. 500.

Finally, the judgment-debtor must plead all applicable defenses. See Stanton v. Brown, 269 S.W.2d 853 (Tex. Civ. App. 1954). As a practical matter, the judgment-debtor's defenses are generally limited to payment, accord and satisfaction, and discharge.

## g. The Hearing

At the hearing on Plaintiff's application, Plaintiff need only establish that the requested revival is allowed by C.P.R.C. § 31.006. This may be apparent from the court's record; however, it may not. As is the case with many revival of judgments, the underlying documents may be quite old and not readily retrieved. Plaintiff should make arrangements to ensure that the entirety of the court's file is available to the court and to be prepared to offer into evidence any documents which are not officially part of that record. This is especially true in cases where the record does not reflect an officer's return of a writ of execution which may have been delivered by the clerk to Plaintiff's attorney. The bottom line is that Plaintiff must make a *prima facie* showing that they are entitled to the relief requested.

Once Plaintiff has made a *prima facie* showing in support of the application, the burden shifts to the Defendant to either defeat an aspect of plaintiff's showing or to prove an affirmative defense. Generally, this comes down to three possible proofs: (i) payment, (ii) accord and satisfaction, or (iii) discharge. Defendant should not simply rely upon their testimony, but should bring forth such documentary evidence as would be admissible to prove the defense asserted.

## h. Pre-judgment Relief is Available to the Applicant

While, technically, judgment upon a *scire facias* to revive a judgment is only that execution issue, "effect should be given to the substance of the proceeding rather than its form." Coleman v. Zapp, 105 Tex. 491, 151 S.W. 1040 (1912) (holding that pre-hearing attachment was available because the judgment was a debt and the proceeding to revive it was nothing more nor less than a suit for debt). See also Continental Supply Co. v. Carter, 13 S.W.2d 927 (Tex. Civ. App. 1929) (garnishment action allowed in conjunction with application for writ of *scire facias*).

## C. Revival of a Judgment by Action of Debt

An "action of debt" is a new suit (i) based upon an original judgment and (ii) brought against one or more of the judgment debtors or those holding property of the judgment debtors. See Burge v. Broussard, 258 S.W. 502 (Tex. Civ. App.–Beaumont 1924, writ ref'd.); see also Koenig v. Marti, 103 S.W.2d 1023, 1025 (Tex. Civ. App. 1937, writ dism'd w.o.j.). It is a new and independent cause of action. See Hall v. Oklahoma Factors, 935 S.W.2d 504, 507 (Tex. App.–Waco 1996). There is no difference between "a suit to revive a dormant judgment," "a suit for debt" and "an action of debt." See In re Brints, 1998 Bankr. LEXIS 1574 (Bankr. N.D. Tex. 1998).

1. Cases Which Have Been Held to Be an "Action on Debt" Include:

- (a) a suit to revive a dormant judgment - See Ater v. Knight, 218 S.W. 648 (Tex. Civ. App.–Amarillo 1920, writ ref'd.).
- (b) adversary proceeding to revive a dormant judgment - See In re Brints, 1998 Bankr. LEXIS 1574 (Bankr. N.D. Tex. 1998); In re Deasy, 275 B.R. 490, 2002 Bankr. LEXIS 308, affirmed 2002 U.S. Dist. LEXIS 17851 (N.D. Tex. 2002).
- (c) petition to foreclose a judgment lien - See Churchill v. Russey, 692 S.W.2d 596, 597-598 (Tex. App.–Fort Worth 1985, no writ).

2. Jurisdiction and Venue

## a. There Are No Special Jurisdiction or Venue Issues When Pursuing an Action of Debt

When a proceeding for the revival of a judgment is treated as an independent action for debt, the result is the creation of a new suit; and the power to render judgment in such a proceeding must depend upon jurisdiction over the person of the defendant and the subject matter of the

claim, as in any other suit. See Collin County Nat'l Bank v. Hughes, 110 Tex. 362, 368 (Tex. 1920); see also Koenig v. Marti, 103 S.W.2d 1023, 1025 (Tex. Civ. App. 1937, writ dismissed w.o.j.).

b. Whether a Texas Court Should Revive a Judgment Is a Function of the Laws of the State of Texas

In refusing to recognize a dormant federal judgment as the basis for an action on debt, the Court in Collin County Nat'l Bank, 110 Tex. at 368, stated “[i]t was fully within the power of the State to prescribe the period of limitation for actions in its own forums upon judgments rendered in other jurisdictions, Federal jurisdictions as well as any other.”

c. A Sister State Can Recognize a Dormant or Dead Judgment

In Roche v. McDonald, 275 U.S. 449, 452 (U.S. 1928), plaintiff obtained a judgment in Washington which, thereafter, expired and could not be revived. Based upon the then-dead Washington judgment, plaintiff obtained a second judgment against the debtor in Oregon which plaintiff then domesticated to Washington. Debtor objected to enforcement of the second judgment in Washington as being invalid and in contravention of the Washington statutes as they related to the underlying debt; claiming such judgment would have been void if rendered in a court of Washington. The Court held that the second judgment could not be impeached upon that ground. If the debtor had desired to rely upon a Washington statute as a protection from any judgment that extended the force of the Washington judgment beyond its statute of limitations, the debtor was required to assert such a defense in the Oregon case. However, once a valid Oregon judgment was rendered, it was conclusive in the courts of Washington and only such defenses as would be good to a suit thereon in the rendering State can be relied upon in the courts of any other State. A judgment, if valid as rendered, must be enforced by every other State, even if such enforcement is repugnant to such a state's own statutes.

3. Necessary Parties

Generally, a revival of the judgment cuts off only such rights as existed prior to the rendition of the original judgment; it does not, unless under special allegations for that purpose, interfere with rights subsequently acquired. However, when special allegations are made affecting the rights of third-parties such persons must be made party to the action of debt. See Robertson v. Coates, 65 Tex. 37, 41 (Tex. 1885).

4. Pleading Requirements

a. Plaintiff's Pleadings

In an action on a judgment, it is not necessary for the plaintiff to bring before the court the proceedings in the underlying suit. See Bullock v. Ballew, 9 Tex. at 500; see also Schleicher v. Markward, 61 Tex. 99, 101 (Tex. 1884).

(1) Damages Must Be Pled

In City of Houston v. Emery's Sons, 76 Tex. 282, 285 (Tex. 1890), plaintiff made no specific prayer for damages, but instead, asked that two judgments “be revived by scire facias, if necessary, and that they have all the relief necessary to make valid said judgments.” The lower court entered judgment for a sum equal to the principal, the accrued interest, and the costs due on the underlying judgments. The Texas Supreme Court reversed, noting that there was no general prayer for relief, “and while the facts pleaded were such as would entitle appellants to the judgment rendered . . . we are of the opinion that the court should not have entered the judgment found in the record.”

(2) Damages Need Not Be Pled with Particularity

In Bridges v. Samuelson, 73 Tex. 522; 11 S.W. 539; (Tex. 1889), plaintiff's petition to revive a dormant judgment alleged that the original judgment was “a subsisting, valid, final, unappealed from judgment and a wholly unpaid debt against defendant, and that it was still owned and held by plaintiffs.” There was prayer for judgment for the amount of the dormant judgment, interest thereon from its date, and costs of both suits. The Bridges Court found that although the petition failed to describe in detail the terms of the original judgment, the basis for relief was sufficiently established as to apprise the defendant of the nature of the claim and to provide a basis for computing the damages. Notwithstanding, the Bridges decision, it is the better practice to at least recite the terms of the original judgment and calculate and carry forward any post-judgment interest as part of plaintiff's requested relief.

(3) Costs May Be Recovered If Pled

In Bridges v. Samuelson, 11 S.W. at 539, the Court awarded costs to the judgment creditor over the objections of the debtor, while noting that had the creditor sought to revive the judgment by scire facias, costs could not have been awarded.

b. Defendant's Pleading Requirements

The Defendant must assert all affirmative defenses upon which they will rely. If the defendant intends to

relay upon any of the affirmative defenses set forth in Tex. R. Civ. Proc. Rule 94, defendant must plead the defense and satisfy the requirements of Tex. R. Civ. Proc. Rule 95, if applicable. Thereafter, the defendant must make a prima facie showing of such defense. See Harrison v. Costello, 47 S.W.2d 871, 872 (Tex. Civ. App. 1932) (introduction of the order of discharge makes out a prima facie defense).

#### 5. Plaintiff Must Exercise Diligence in Obtaining Service Upon the Defendant

C.P.R.C. § 31.006 requires only that an action of debt be "brought" within ten years after the date of the judgment. However, courts have interpreted this requirement to include not only the issuance of the Citation, but diligent service of process. As stated by the Texas Supreme Court, "It is the settled law of this state that the mere filing of the petition in a suit of this nature does not toll the statute of limitations. There must be a bona fide intention also that process be issued and served and due diligence exercised that such process issue and be served." First State Bank & Trust Co. of Rio Grande City, et al. v. Ramirez, et al., 133 Tex. 178, 126 S.W.2d 16, 18 (Tex. 1939). Therefore, in order to toll the statute of limitation with regard to a Section 31.006 action, plaintiff is required to continue to exercise ordinary diligence to obtain service. Hughes v. McClatchy, 242 S.W.2d 799, 804 (Tex. App. 1951).

#### 6. Prosecuting the Suit to Judgment

Upon defendant's answer, plaintiff should move for summary judgment and offer the original judgment as summary judgment evidence. The original judgment is *res judicata* as to the claims asserted in the original proceeding and when offered in compliance with C.P.R.C. § 36.001, establishes, as a matter of law, plaintiff's entitlement to the relief requested.

#### 7. Pre-Judgment Relief is Available to the Plaintiff

In Continental Supply Co. v. Carter, 13 S.W.2d 927 (Tex.App. 1929), a garnishment action filed in conjunction with application for writ of scire facias was allowed to proceed as an ancillary proceeding. See Coleman v. Zapp, 105 Tex. 491, 151 S.W. 1040 (1912). See also Carlton v. Hoff, 292 S.W. 642, 647 (Tex. Civ. App. 1927) (Garnishee may not assert as a defense, that the writ of garnishment is voidable because of the dormancy of the judgment on which it is based).

#### 8. Special Circumstances - Death of the Judgment-Debtor

##### a. Death of a Debtor - Estate Administered

A creditor must bring suit for the collection of a claim against the personal representative of the deceased debtor, and not against the debtor's heirs. See McC Campbell v. Henderson, 50 Tex. 601 (1879). Such suit should be brought in the probate court. See Henderson v. Van Hook, 25 Tex. 453 (Tex. 1860).

##### b. Death of a Debtor - Estate Not Administered

If there is no administration upon the estate of the defendant, and the facts show that none is necessary or desired by those interested in such estate, and especially if owing to the lapse of time the statute forbids the grant of administration upon the estate, and the heirs are in possession of the debtor's property, they are in such sense the representatives of their ancestor that a pending action may be revived or an original suit brought against them. See McC Campbell v. Henderson, 50 Tex. 601 (1879); see also Low v. Felton, 84 Tex. 378, 385, 19 S.W. 693 (Tex. 1892). In such an action, the claimant must plead and prove that assets were left by the deceased at his death and that the heirs are in possession of property of the ancestor. See Schmidtke v. Miller, 71 Tex. 103, 107, 8 S.W. 638 (Tex. 1888). The case cannot be tried upon the theory that the plaintiff was entitled to call on the heirs to answer for the debt of their ancestor. Id.

## V. CONCLUSIONS

### A. **Concerning the Renewal of a Judgment**

The renewal of a judgment by the issuance of periodic writs of execution is the most cost effective and simplest method for keeping a judgment alive. There does not need to be an expectation that property actually be seized, nor does the judgment creditor need risk anything more than the fee for issuance of the writ and the cost to deliver the writ to an appropriate officer for execution. If the writ is being issued solely for the purpose of extending the judgment, it needs to be properly returned and made a part of the court's file.

A valid and subsisting judgment provides the basis for seeking sister state domestication and enforcement proceedings. The Full Faith and Credit Clause of the Constitution ensures that this is not discretionary to the States.

### B. **Concerning the Revival of a Judgment**

#### 1. Scire Facias vs. Action of Debt

An application for writ of scire facias is inexpensive, limited in scope and easily accomplished. By virtue of

the court's prior jurisdiction over the judgment-debtor, the service requirements may be somewhat relaxed, especially when personal service of the debtor is difficult. The resulting order of the court is that the original judgment be revived and that execution issue. If this is all that is needed, then scire facias is sufficient.

An action of debt is a desirable approach when the judgment-creditor does not wish to invoke the original jurisdiction of the court. This may occur for reasons such as the need to pursue aggressive enforcement of a judgment originally rendered by a distant court. An action of debt also results in a new judgment; one which may have language more to the judgment-creditor's liking. This is especially true if the original judgment awarded damages in language that a sister state may find hard to administer (i.e., "post-judgment interest as allowed by law"). In addition, the new judgment obtains a current date. If the revived judgment is going to be utilized in a foreign jurisdiction, it may be easier to obtain recognition of a judgment dated recently and which clearly recited the award, than to try to explain why enforcement should be granted to a 1976 judgment which was renewed by the issuance of writs of execution on two occasions and then revived by scire facias. However, it must be noted that a significant downside of an action of debt is that it is a new case and, consequently, susceptible to being sidetracked by the litigation tactics of the opposing party.

## 2. Execution May Issue

Revival of a judgment allows that "execution may issue." This is the only relief available on an application for writ of scire facias and is inherently part of any judgment rendered on an action of debt. Both processes, whether founded in the original judgment or encompassed in a new judgment, give the judgment creditor access to the full range of post-judgment collection tools which are available to enforce a valid judgment and return the judgment-creditor to its full standing to pursue such enforcement.

## APPENDIX

## Statute of Limitations for Judgments of Other States

<u>State</u>	<u>Years</u> <u>Enforceable</u>	<u>Can Judgment</u> <u>Be Renewed?</u>
Alabama	20	No
Alaska	10	No
Arizona	5	Yes
Arkansas	10	Yes
California	10	Yes
Colorado	20	Yes
Connecticut	20 - 25	No
Delaware	3	No
Florida	20	Yes, must renew at 7 yrs
Georgia	7	No
Hawaii	10	Yes
Idaho	5	Yes
Illinois	20	No
Indiana	20	Yes
Iowa	10	Yes, can renew in 9th yr
Kansas	5	Yes
Kentucky	15	No
Louisiana	10	No
Maine	20	Maybe
Maryland	12	No
Massachusetts	20	Yes
Michigan	10	Yes
Minnesota	10	No
Mississippi	7	No
Missouri	10	No
Montana	10	No
Nebraska	5	Yes
Nevada	6	No
New Hampshire	20	No
New Jersey	20	No
New Mexico	14	No
New York	20	Yes
North Carolina	10	No
North Dakota	10	Yes
Ohio	21	Yes, every five years
Oklahoma	5	Yes
Oregon	10	Yes
Pennsylvania	5	Yes
Rhode Island	20	No
South Carolina	10	No
South Dakota	10	Yes
Tennessee	10	No
Utah	8	No
Vermont	8	No
Virginia	20	No
Washington	10	Yes
Washington, D.C.	20	No
West Virginia	10	No
Wisconsin	20	No
Wyoming	5	No



**CAUSE NO. (Original Case Number)**

<u>(JUDGMENT HOLDER)</u> , as assignee	§	IN THE DISTRICT COURT
of a judgment rendered in favor of	§	
<u>(JUDGMENT PLAINTIFF)</u>	§	
Plaintiff,	§	
	§	
vs.	§	_____ JUDICIAL DISTRICT
	§	
<u>(JUDGMENT DEBTOR)</u> ,	§	
Defendant.	§	DALLAS COUNTY, TEXAS

**APPLICATION FOR WRIT OF SCIRE FACIAS TO REVIVE JUDGMENT**

NOW COMES, (JUDGMENT HOLDER), [as assignee of a final judgment rendered in favor of (Judgment Plaintiff) / plaintiff] in the above-entitled and numbered cause ("Plaintiff") and files this its *Application for Writ of Scire Facias to Revive Judgment* (hereinafter, the "Application") and in support thereof would show unto the Court as follows:

1. This Application is supported by the affidavit of (Client Rep's Name) (the "**(Rep's Last Name) Affidavit**") attached hereto as **Exhibit "A"** and incorporated by reference herein for all purposes.
2. On (Date of Original Judgment), a final judgment was rendered in favor of (Judgment Plaintiff) in the above-entitled and numbered cause and against defendant (Judgment Debtor) in the sum of (Total Amount of Judgment), which included damages of (Damage Amount), prejudgment interest of (Pre-Judgment Interest Amount), attorneys fees of (Attorneys Fees), and costs of court (hereinafter, the "Judgment"). Post-judgment interest at the rate of (Post-Judgment Interest Rate) was awarded by the Judgment as well. A true and correct copy of the Judgment is attached as **Exhibit "1"** to the (Rep's Last Name) Affidavit.  
 [If Needed] 3. Thereafter, by virtue of a series of assignments (the "Assignments"), (Judgment Holder) became assignee, owner and beneficiary of all rights under the Judgment. True and correct copies of the Assignments are attached as **Exhibit "2"** to the (Rep's Last Name) Affidavit.  
 [If Needed] 4. Since the rendition of the Judgment, (Number of Writs) Writs of Execution have been issued by the clerk of the court and each was promptly delivered to the appropriate officer of the State for execution thereon. The dates issuance were as follows: (Dates of Writs). True and correct copies of returned Writs of Execution are attached as **Exhibit "3"** to the (Rep's Last Name) Affidavit.

5. Based upon the date of rendition of the Judgment [and the above-described writ of execution history], the Judgment became dormant on (Date of Dormancy). This Application seeks to revive the Judgment as to the judgment debtor (Judgment Debtor) ("Judgment Debtor") pursuant to TEX. CIV. PRAC. & REM. CODE § 31.006.

6. As of (Reference Date), there remains due and owing on the Judgment by the Judgment Debtor, damages in the amount of (Unpaid Damages), prejudgment interest in the amount of (Unpaid Prejudgment Interest), attorneys fees in the amount of (Unpaid Attorneys Fees) costs of court. Post-judgment interest has and continues to accrue from the original date of judgment at the rate of (Post-Judgment Interest Rate) and remains unpaid as well.

7. All payments made, credits and offsets have been credited to the Judgment.

8. The Judgment has not been paid, or otherwise settled or compromised.

9. (Judgment Holder) brings this proceeding to revive the Judgment and to extend the enforcement of same.

10. (Judgment Holder) asks the Court to take judicial notice of the Judgment and all Writs of Execution related to the above-entitled and numbered cause.

**WHEREFORE, PREMISES CONSIDERED,** (Judgment Holder) requests from this Court the following:

1. Scire facias writ(s) be issued as to defendant (Judgment Debtor) in the manner and form prescribed by law, requiring defendant (Judgment Debtor) to appear and show cause why the Judgment should not be revived;
2. The Judgment be revived in all respects and extended for the full period provided by law;
3. The Court direct the issuance of execution on the Judgment;
4. The Court award (Judgment Holder) all costs; and
5. The Court grant (Judgment Holder) such other and further relief to which (Judgment Holder) may show itself to be justly entitled.

Respectfully Submitted,

[Signature Block]



[If Needed] 5. "Since the rendition of the Judgment, (Number of Writs) Writs of Execution have been issued by the clerk of the court and each was promptly delivered to the appropriate officer of the State for execution thereon. The dates issuance were as follows: (Dates of Writs). True and correct copies of returned Writs of Execution are attached as **Exhibit "3"** and incorporated herein by reference for all purposes.

6. "There is no outstanding and unreturned execution on the Judgment.

7. "All payments made, credits and offsets have been credited to the Judgment.

8. "The Judgment has not been paid, or otherwise settled or compromised.

9. "There are no counterclaims or set-offs in favor of Judgment Debtor.

10. "As of (Reference Date), there remains due and owing on the Judgment by the Judgment Debtor, damages in the amount of (Unpaid Damages), prejudgment interest in the amount of (Unpaid Prejudgment Interest), attorneys fees in the amount of (Unpaid Attorneys Fees) costs of court. Post-judgment interest has and continues to accrue from the original date of judgment at the rate of (Post-Judgment Interest Rate) and remains unpaid as well.

11. "This Affidavit is made and filed for the purposes of reviving the Judgment in the manner and for the period prescribed by law."

FURTHER AFFIANT SAYETH NOT.

SIGNED this \_\_\_\_\_ day of (Date).

\_\_\_\_\_  
(Client Rep's Name), Affiant

SUBSCRIBED AND SWORN TO BEFORE ME on this \_\_\_\_\_ day of (Date).

\_\_\_\_\_  
Notary Public, State of (State)

CAUSE NO. (Original Case Number)

<u>(JUDGMENT HOLDER)</u> , as assignee	§	IN THE DISTRICT COURT
of a judgment rendered in favor of	§	
<u>(JUDGMENT PLAINTIFF)</u>	§	
Plaintiff,	§	
	§	
vs.	§	_____ JUDICIAL DISTRICT
	§	
<u>(JUDGMENT DEBTOR)</u> ,	§	
Defendant.	§	DALLAS COUNTY, TEXAS

**WRIT OF SCIRE FACIAS**

TO: (Judgment Debtor) at (Judgment Debtor's Address).

On (Date of Original Judgment), a final judgment was rendered in favor of (Judgment Plaintiff) in the above-entitled and numbered cause and against defendant (Judgment Debtor) in the sum of (Total Amount of Judgment), which included damages of (Damage Amount), prejudgment interest of (Pre-Judgment Interest Amount), attorneys fees of (Attorneys Fees) costs of court (hereinafter, the "Judgment"). Post-judgment interest at the rate of (Post-Judgment Interest Rate) was awarded by the Judgment as well.

The Judgment has become dormant and (Judgment Holder) as [assignee / holder] of the Judgment, has filed a petition and applied for a writ of scire facias to revive the Judgment.

You are, hereby, commanded to appear before (Court Type and Number) of (County of Venue), Texas, at \_\_\_\_\_ o'clock \_\_\_\_ .m., on \_\_\_\_\_; there to show cause, if any there be, why the Judgment rendered in the above-entitled cause should not be revived as requested by (Judgment Holder). On your failure to do so, an order and judgment will enter for the relief demanded in the application.

The nature of (Judgment Holder)'s demand is shown by a true and correct copy of its application accompanying this citation, the original of which is on file in this cause.

If this citation is not served within 60 days after the date of its issuance, it shall be returned unserved.

The officer executing this writ shall promptly serve the same according to requirements of law, and the mandates of this order, and make due return as the law directs.

[Continued on Next Page]

Issued and given under my hand and seal fo the court on this \_\_\_\_\_, day of \_\_\_\_\_, 200\_\_\_\_.

**CLERK OF THE DISTRICT COURT  
DALLAS COUNTY, TEXAS**

\_\_\_\_\_  
Deputy District Clerk for Dallas County

**PROOF OF SERVICE**

**SERVED AT:**

Date	Time	Place
<b>SERVED ON:</b> (Print Name) _____ by personally delivering to such person the Writ of Scire Facias, as well as a copy of the Application for Writ of Scire Facias to Revive Judgment related thereto.		
<b>SERVED BY:</b>		
Name	Title	License No.

**DECLARATION OF SERVER**

I declare under penalty that the foregoing information contained in the Proof of Service is within my personal knowledge and is true and correct.

SIGNED this \_\_\_\_\_ day of (Date).

\_\_\_\_\_  
(Process Server's Name) , Affiant

SUBSCRIBED AND SWORN TO BEFORE ME on this \_\_\_\_\_ day of (Date).

\_\_\_\_\_  
Notary Public, State of Texas

CAUSE NO. (Original Case Number)

<u>(JUDGMENT HOLDER)</u> , as assignee	§	IN THE DISTRICT COURT
of a judgment rendered in favor of	§	
<u>(JUDGMENT PLAINTIFF)</u>	§	
Plaintiff,	§	
	§	
vs.	§	____ JUDICIAL DISTRICT
	§	
<u>(JUDGMENT DEBTOR)</u> ,	§	
Defendant.	§	DALLAS COUNTY, TEXAS

**ORDER REVIVING JUDGMENT**

On this day, came on to be considered the *Application for Writ Scire Facias to Revive Judgment* (the “Application”) of (Judgment Holder) (“Movant”), [successor in interest to (Judgment Plaintiff), the judgment-creditor in the above-entitled and numbered case. The Court, having reviewed the pleadings and papers filed in this case finds that defendant (Judgment Debtor) (“Defendant”) was duly served in accordance with the law and that Defendant was commanded to appear in this court to show cause why the judgment rendered by this court in the above-entitled and numbered cause should not be revived on the Application of the Movant. Defendant did not appear and Defendant did not show cause why said judgment should not be revived. The Court, having considered the Application, the evidence and the arguments presented therefore finds that the final judgment rendered in the above-entitled and numbered cause should be revived. Accordingly,

**IT IS HEREBY, ORDERED, ADJUDGED AND DECREED**, that the final judgment rendered in the above-entitled and numbered cause is hereby revived in all respects as to (Judgment Debtor) ;

**IT IS FURTHER ORDERED** that execution on the revived judgment may immediately issue; and

**IT IS FURTHER ORDERED** that all costs are taxed against the Defendant, (Judgment Debtor).

All relief requested by (Judgment Holder) 's Application not granted herein, is expressly denied.

SIGNED this \_\_\_\_ day of \_\_\_\_\_, 200 \_\_\_\_.

\_\_\_\_\_  
JUDGE PRESIDING